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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CHARLES COLBY,

Plaintiff and Respondent,

v.

MARK B. BAER as Trustee etc.,

Defendant and Appellant.

B205973

(Los Angeles County
Super. Ct. No. BP096046)

APPEAL from a judgment of the Superior Court of Los Angeles County, Aviva K. Bobb, Judge. Affirmed.

Oldman, Cooley, Sallus, Gold, Birnberg & Coleman and David Coleman; Esner, Chang & Ellis, Gregory R. Ellis and Stuart B. Esner for Defendant and Appellant.

Goodson Wachtel and Petrulis and Kenneth G. Petrulis for Plaintiff and Respondent.

INTRODUCTION

Appellant Mark B. Baer, as Trustee of the Shirley Colby Declaration of Trust Dated August 11, 2005, appeals from a judgment in favor of respondent Charles Colby. The judgment awarded damages to respondent based on the breach of a palimony agreement by the deceased trustor, Shirley Colby. Appellant contends the judgment is not supported by substantial evidence. We affirm.

FACTS

Charles and Shirley¹ married in June 1984. At that time, Charles was in his mid-60's, and Shirley was about 20 years younger.

During their marriage, Charles and Shirley lived in a house at 704 North Palm Drive in Beverly Hills. The house was approximately 6,000 square feet in area. Shirley was awarded the house following dissolution of her first marriage, to Dr. Howard Baer.

Charles and Shirley's marriage ended in 1995 and was formally dissolved in 1996. According to Charles, he and Shirley developed irreconcilable differences due to the financial demands she placed upon him. She was determined to remain in the Palm Drive house and live a wealthy lifestyle beyond what Charles was willing or able to provide for her.

In the dissolution, Shirley was awarded the Palm Drive house as her separate property. Shirley was awarded \$15,500 per month in spousal support for two and one-half years, then \$15,000 per month for the next two and one-half years. Spousal support would cease on July 31, 2000, but Shirley would be permitted to move to extend her support beyond that date without having to show a change of circumstances.

¹ For ease of reference, and meaning no disrespect, we refer to the Colbys by their first names. (*In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801, 803, fn. 2.)

Shirley remained in the Palm Drive house, living primarily on the spousal support, which Charles paid. She also received a small monthly social security payment. While she had some funds invested and an interest in family property, her primary asset was the house.

Charles bought two homes in the Marina del Rey-Venice area and moved there. He maintained a cordial relationship with Shirley, and the two periodically saw one another socially. He believed that Shirley still loved him and was flattered that such a beautiful woman, 20 years his junior, loved him.

On occasion, Charles gave Shirley money in addition to the spousal support when she asked him for it. Charles believed that it was the man's responsibility to support the woman, and Shirley did not believe it was right for a woman to support a man. Charles always paid when the two went out to dinner, he paid approximately \$20,000 for Shirley's medical bills, bought her jewelry and took her on European vacations. He believed that by making these payments on Shirley's behalf, she eventually would take him back.

During the marriage, Charles had developed a close relationship with Shirley's son, Mark Baer (Mark), and helped pay for Mark's education. Charles continued to maintain a relationship with Mark after the dissolution, meeting about every other month for dinner. Their relationship continued even when Mark and Shirley were estranged due to her disapproval of his sexual orientation.

In early 1999, Shirley discussed the impending cessation of spousal support with Mark, who had become a family law attorney. The Palm Drive house needed repairs, and Shirley did not have the money for them. She also was concerned about maintaining her lifestyle. Shirley and Mark decided to approach Charles about his continuing to make support payments after July 2000 in exchange for allowing Charles to move back into the Palm Drive house.

Shirley and Mark went to Charles's home to propose that he continue making support payments and move back into the Palm Drive house. Charles rejected the proposal.

At the time, Charles was 79 years old. He had suffered a heart attack and had other health problems. According to Mark, Shirley offered to ensure that Charles got proper exercise and healthy food, and saw the best physicians, in exchange for his moving back into the Palm Drive house and continuing support payments. Charles could not recall Shirley making this offer at the meeting with Mark, however.

Shirley continued to discuss the matter with Charles. She said that their living apart was not successful and they should get back together. Charles agreed that they should try it. Ultimately they agreed that they would “take care of each other.” Charles moved back into the Palm Drive house in late January or early February 2000. About that time, they agreed that Charles would pay Shirley \$15,000 per month and would pay for landscaping the backyard. At a later point in time, Charles agreed to pay for remodeling the house.

Charles had some qualms about getting back together with Shirley, due to the way she spent money. He put them in the back of his mind, however.

Charles sold his Marina del Rey-Venice homes for net proceeds of approximately \$135,000.² He sold his boat for net proceeds of \$240,000. He owned a corporation, Anita Industries, worth \$1,878,031. The corporation had operated a chain of women’s clothing stores but, after his retirement prior to his marriage to Shirley, the corporation owned only investment accounts. Charles also received social security. Charles used his income, proceeds from the sales, and proceeds from the sale of the corporation’s investments to make the monthly payments to Shirley.

Charles and Shirley kept their money separate. They had their own credit cards. The \$15,000 that Charles gave to Shirley every month was hers to spend as she pleased.

Charles did not consider what would happen if his return to the Palm Drive house did not work out. He did not discuss with Shirley what would happen if they split up. He

² Shirley suggested that it would make better sense financially to rent out the property, but Charles did not want to be a landlord so decided to sell it.

also did not discuss with Shirley what would happen if he ran out of money to pay her \$15,000 monthly.

Charles never discussed with Shirley putting their agreement in writing. He did not believe that Shirley would sign such an agreement. He also felt it would be a violation of trust to ask her to sign an agreement.³

Over the next few years, Charles spent \$175,000 to \$180,000 to remodel the Palm Drive house. He took Shirley to dinner several times a week. He took her on vacation to Europe once a year. He also bought her jewelry and paid some of her medical expenses. He sometimes would deduct the amounts he spent for such items from the following month's payment to Shirley.

After a few years, however, Charles's funds began to run low. He began paying Shirley less than \$15,000 per month. While she did not complain about the decreased payments, she asked why he did not anticipate the shortfall and sell something, so he would have the money to pay her.

In late 2003, Charles told Shirley that he was going to run out of money and they would have to make some adjustments to their arrangement. She told him not to worry; they had enough assets and would be able to take care of each other. She did not tell him that if he could not pay her \$15,000 per month that she would kick him out of the Palm Drive house.

They discussed the possibility of refinancing the Palm Drive house. Shirley also began looking for another house that might reduce their monthly expenses.

In May of 2004, Charles fell and injured his shoulder. He spent about two months in a rehabilitation facility. While he was there, Shirley spoke to Mark about whether she should let Charles return to the Palm Drive house. She said she was tired of fighting with Charles over money every time he was supposed to pay her.

³ Charles did speak with an attorney in 2002 about putting the agreement in writing.

Shirley had been diagnosed with breast cancer in the mid-1980's. She was treated and it went into remission, but it recurred about 1998. She again started undergoing cancer treatment. In 2004, she was seriously ill with stage IV cancer that had spread to various areas of her body.⁴ Shirley was upset that Charles yelled at her and berated her over money when she was so ill.

Nevertheless, when Charles was released from the rehabilitation facility, Shirley allowed him to return to the Palm Drive house. She explained to Mark that while Charles was in the rehabilitation facility he was very nice to her and he apologized for his bad behavior.

In the fall of 2004, Shirley learned that a piece of property in which she had inherited an interest was going to be sold. Her share would be about \$1 million.⁵

Thereafter, Shirley persuaded Charles to take her on a trip to Europe. When Charles claimed financial hardship, she promised to repay him for part of the cost when she sold some things. When they returned from the trip, however, she refused to pay him.

In mid-January 2005, Charles told Shirley that he could no longer pay her \$15,000 a month. He had used up most of his personal funds and all that remained of his assets was approximately \$250,000 in Anita Industries assets.

In response, Shirley told Charles that he would have to leave the Palm Drive house. Charles accused Shirley of reneging on their agreement to take care of one another. Shirley said she was sorry, but that was the way it had to be.

⁴ Charles testified that he did not know the extent of Shirley's illness; she shared very little about her condition and maintained her regular schedule to a great extent. Mark testified, however, that he found out from Charles that his mother had stage IV cancer. According to Charles, he never told Mark that Shirley had stage IV cancer and did not even find out about it until the trial of this case.

⁵ According to Mark, Shirley did not learn the property was going to be sold until December 2004—after the European trip and her subsequent decision to ask Charles to move out of the Palm Drive house.

About this time, Shirley told Mark and her doctor that the reason why her cancer treatment wasn't working and her cancer markers were going up was because of the stress of her arguments with Charles over money. Her doctor told her that was not the case, but she continued to insist that was the case. She told Mark that one of the reasons she was asking Charles to leave her house was to eliminate the stress he was causing her.⁶

About a week after Shirley told Charles to leave the Palm Drive house, he moved out. At her request, however, he paid \$3,000 in property taxes on the house.

After moving out, Charles initially made no attempt to get Shirley to change her mind. He tried calling her, but she did not answer his calls. In April 2005, he met with an attorney, who told him he might have a case against Shirley. Charles began assembling evidence for the case. In August, he wrote a letter to Shirley, requesting a meeting to discuss the situation. He received no response.

On September 21, 2005, Shirley died. About a month prior to her death, Shirley executed the Shirley Colby Declaration of Trust and transferred the Palm Drive house to the trust. Mark was the trustee of the trust and, after Shirley's death, the executor of her estate.

PROCEDURAL BACKGROUND

Charles filed an action in the probate court against Shirley's trust for a constructive trust, breach of contract, fraud, an accounting and restitution. He claimed that under his agreement with Shirley, he was entitled to a life estate in the Palm Drive house. He also sought damages for her breach of the agreement.

⁶ According to Charles, Shirley never told him she was asking him to leave because the stress he was causing her was making her cancer worse. According to Mark, Shirley never told him that she was asking Charles to leave because he could no longer pay her the \$15,000 per month.

Mark, as executor of Shirley's estate, filed a civil action against Charles for breach of contract, open account, fraud, negligent misrepresentation, elder abuse, intentional infliction of emotional distress, assault, battery, and quantum meruit. He claimed Charles breached the agreement with Shirley by failing to pay her the \$15,000 per month he promised her, and Charles was abusive toward Shirley.

The two cases were related for trial in the probate court. Following trial, judgment was entered in Charles's favor in the amount of \$900,935.

The trial court explained in its statement of decision that in evaluating the testimony, it had questions about Mark's testimony, finding that Mark at times was either evasive or changed his testimony. The court found Charles credible, however.

The court found that Charles and Shirley's promises to "take care of each other (for the rest of our lives)" constituted an enforceable *Marvin*⁷ agreement, under which Charles "was entitled to shelter for the rest of his life." Charles fully performed his portion of the agreement by paying Shirley as long as he was able, until he had nothing left but "a relatively small reserve of funds which needed to last him the rest of his life." The court found that "[h]ad the agreement allowed Shirley to terminate the agreement when Charles had expended all of his funds, it would not have met the reasonable expectations of Charles and Shirley. All evidence indicates that Charles and Shirley intended to live together for the rest of their lives."

The court found that Shirley asked Charles to leave the Palm Drive house "because he was no longer willing or able" to make the monthly payments to Shirley, and she would soon receive \$1 million in cash, which would make Charles's payments to her unnecessary. The court did not believe Mark's claim that Shirley terminated the agreement because she believed her health was being adversely affected by her relationship with Charles. Shirley and Charles had argued throughout their relationship. Shirley invited Charles to move back in with her in the summer of 2004 and then took a

⁷ *Marvin v. Marvin* (1976) 18 Cal.3d 660.

trip to Europe with him. “She obviously still wanted Charles’ company and companionship.”

The court found evidence that Shirley only expected Charles to pay her while he was financially capable of doing so, but she would continue to provide the couple with shelter: Shirley investigated alternatives when Charles told her he was running out of money, Shirley allowed him to move back into the Palm Drive house in July 2004 even though he was no longer paying her \$15,000 per month, and Shirley did not demand additional payments from Charles after the \$3,000 for property taxes in 2005.

That the agreement between Charles and Shirley was merely to take care of each other for the rest of their lives did not make it too uncertain to enforce, the trial court found. It noted that the modern trend in the law was to enforce such contracts rather than to declare them unenforceable due to uncertainty.⁸ Moreover, “a denial of Charles’ reasonable expectation [of a place to live for the rest of his life] after having exhausted nearly all of his . . . life savings, would be contrary to the policy enunciated in [*Marvin* to fulfill the reasonable expectations of parties in a non-marital relationship].”

The trial court found by clear and convincing evidence that Charles was entitled to a life estate in the Palm Drive house. The house had been sold by Shirley’s estate, however. The court therefore found Charles entitled to monetary damages in a sum sufficient to provide him with equivalent shelter for the rest of his life. The court found the reasonable value of such shelter to be \$10,000 per month. Based upon a standard life expectancy table and expert testimony, the court calculated the present value of this sum to be \$900, 935.

DISCUSSION

Mark contends there is insufficient evidence to support the trial court’s findings (1) that Shirley promised Charles she would provide him with shelter for the rest of his

⁸ Citing *Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1065.

life, and (2) that the reasonable value of shelter equivalent to the Palm Drive house was \$10,000 per month. For the reasons set forth below, we disagree.

When the trial court's factual findings have been challenged on appeal, the scope of appellate review is limited to an examination of the entire record to determine whether substantial evidence exists which will support the trial court's conclusion. (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1229; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Substantial evidence is evidence of ponderable legal significance. (*Bowers, supra*, at p. 873.)

The trial court, as trier of fact, has the duty to weigh and interpret the evidence and draw inferences therefrom. (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 598.) We cannot reweigh the evidence or draw contrary inferences. (*2,022 Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377, 1387; *In re Cheryl E., supra*, at p. 598.) We presume the trial court found every fact and drew every reasonable inference necessary to support its determination. (*Provencio v. WMA Securities, Inc.* (2005) 125 Cal.App.4th 1028, 1031.) We cannot reject evidence accepted by the trial court as true unless it is physically impossible or its falsity is obvious without resort to inference or deduction. (*Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1293.)

It is Mark's contention that there is no substantial evidence establishing that Shirley promised Charles a lifetime occupancy right in the Palm Drive house. In his view, Charles and Shirley's promises to "take care of each other" are uncertain and cannot be read to mean that Shirley promised to provide Charles with lifetime shelter.

As noted in *Byrne v. Laura, supra*, 52 Cal.App.4th 1054, on which the trial court relied, "the modern trend of the law favors carrying out the parties' intention through the enforcement of contracts and disfavors holding them unenforceable because of uncertainty.' . . . Marvin endorsed 'a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship.' . . ." (*Id.* at pp. 1065-1066, citations and fn. omitted.)

"The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties' [citation] . . ." (*Byrne v. Laura, supra*, 52 Cal.App.4th at

p. 1066.) The mutual intention of the parties may be ascertained not only by the words used but by the “circumstances surrounding the transaction and the conduct of the parties.” (*Petherbridge v. Prudential Sav. & Loan Assn.* (1978) 79 Cal.App.3d 509, 517; accord, *Byrne*, *supra*, at p. 1067, fn. 4.)

Similarly, a contract whose terms are not spelled out may be construed as an implied contract. As stated in *Friedman v. Friedman* (1993) 20 Cal.App.4th 876 at page 887, “[a]n implied contract “. . . in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being the mere mode of proof by which they are to be respectively established.” [Citation.] It is thus an actual agreement between the parties, ‘the existence and terms of which are manifested by conduct.’ (Civ. Code, § 1621.) Although an implied in fact contract may be inferred from the ‘conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise.’ [Citation.]”

Turning to the instant case, at the time Shirley and Charles began to discuss an agreement, Charles was 79 years old and in poor health. Shirley was 20 years younger, but she had suffered a recurrence of breast cancer. Shirley had an expensive house and lavish lifestyle, which she would be unable to afford on her small social security payment once Charles’s \$15,000 per month spousal support ceased. The two were on reasonably good terms, despite the dissolution of their marriage.

When Shirley and Mark initially proposed that Charles move back into Shirley’s Palm Drive house, he refused. Only when Shirley told him that their living apart was not successful and they should get back together and “take care of each other” did Charles agree.

Thereafter, Charles sold his houses. Although Shirley initially suggested that he rent them because it would make better financial sense, when he told her he did not want to be a landlord she helped him sell them.

Charles and Shirley did not discuss the possibility of their reunion not working out. When Charles told Shirley that he was running out of money, she did not accuse him

of reneging on their agreement or threaten to kick him out of the house but instead tried to look for ways they could afford to live together in the Palm Drive house or perhaps another, less expensive, house.

Despite Shirley's complaints about Charles and his inability to continue to pay her \$15,000 per month after exhausting most of his resources supporting her, Shirley took him back into her house in July 2004 after he was released from a rehabilitation facility. At the time, Shirley herself was ill and was undergoing cancer treatments.

Everything in this factual scenario supports an inference that Charles and Shirley intended his move to the Palm Drive house to be permanent. Charles gave up his home and most of his assets to live with and support Shirley in her house. Neither party could reasonably have expected that, at that point, Shirley could end the relationship, leaving an elderly man, in poor health and reduced circumstances, homeless. Rather, the more reasonable inference is that they intended their living arrangement to be permanent and, if it got to the point where they could no longer afford to live in the Palm Drive house, they would, as Shirley had previously said, find a way to utilize their assets so that they could continue to live together.

Where a contract does not specify the duration of time in which performance must be completed, the duration may be implied from the nature of the contract and surrounding circumstances. (*Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 724-725; accord, *Henry v. Sharma* (1984) 154 Cal.App.3d 665, 670, 672.) The duration implied will be a reasonable time under the surrounding circumstances. (*Henry, supra*, at p. 670; see also *Consolidated Theatres, Inc., supra*, at p. 727.) Here, a reasonable time for the duration of the parties' agreement, under circumstances, is the remainder of their lives.

This case is distinguishable from *Hoxsie v. Clark* (1965) 234 Cal.App.2d 370, cited by Mark. In *Hoxsie*, the court found a decedent's promise to "take care" of plaintiff in her will too uncertain to enforce. (*Id.* at pp. 374-375.) Here, although the same language was used, the surrounding circumstances and the conduct of the parties give context to the promise. Moreover, *Hoxsie* relies on the principle that "[a] definite and

certain promise is a strict requirement in an action in equity to enforce an oral agreement to make a will.” (*Id.* at p. 376.) As discussed above, the rule is not the same in an action to enforce an agreement by unmarried cohabitants. (*Byrne v. Laura, supra*, 52 Cal.App.4th at pp. 1065-1066.)

Mark also contends that there is no substantial evidence of the reasonable rental value of a house comparable to the Palm Drive house, which the trial court found to be \$10,000. The evidence regarding the rental value of the property was Mark’s testimony: “I stated in my deposition that the realtors indicated that a property that sells for \$6.1 million would rent typically for \$40,000 a month, that with regard to [the Palm Drive] house, I guess that assumes everybody would want to live in a house with every kind of mold, including black mold. I wouldn’t pay a dime.”

The trial court found that the value of the Palm Drive house at the time Charles left was \$4,550,000. Using Mark’s figures, the rental on a house of that value would be \$29,836. The court’s figure of \$10,000 thus was more than reasonable.

Mark claims his statement does not constitute substantial evidence as to the rental value of the house, in that he is not an expert, and he testified that the house was not worth \$40,000 per month to rent.

While Mark was not an expert, he was relating what he had been told by an expert. This may have been hearsay, but he did not object to the admission of the statement.

Mark did testify that the house was not worth \$40,000 per month to rent, but the trial court awarded Charles only one quarter of that amount as the reasonable rental value of the house. Additionally, while there might have been mold in the house, it clearly did not render the house uninhabitable. Charles and Shirley lived in the house, and Charles sought to continue living in the house.

Additionally, Charles’s financial expert, Certified Public Accountant Jason Engel, used the \$10,000 figure in calculating a damage award. Mark’s attorney questioned him as to the appropriateness of this figure, given the mold problem in the house. Engel responded that a “\$4.4 million house by definition suggests a significant rental value.”

This evidence supports the trial court's finding that \$10,000 per month was the reasonable rental value of the house.

In summary, there is substantial evidence to support the trial court's findings that Shirley promised Charles she would provide him with shelter for the rest of his life, and the reasonable value of shelter equivalent to the Palm Drive house was \$10,000 per month.

DISPOSITION

The judgment is affirmed. Charles is awarded his costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.